

decision under the Disputes clause of the contract. (Demanding payment of the penalty is separate from demanding repayment of any paid portion of the disallowed cost.)

#### 42.709-4 Computing interest.

For 42.709-1(a)(1)(ii), compute interest on any paid portion of the disallowed cost as follows:

(a) Consider the overpayment to have occurred, and interest to have begun accumulating, from the midpoint of the contractor's fiscal year. Use an alternate equitable method if the cost was not paid evenly over the fiscal year.

(b) Use the interest rate specified by the Secretary of the Treasury pursuant to Pub. L. 92-41 (85 Stat. 97).

(c) Compute interest from the date of overpayment to the date of the demand letter for payment of the penalty.

(d) Determine the paid portion of the disallowed costs in consultation with the contract auditor.

#### 42.709-5 Waiver of the penalty.

The cognizant contracting officer shall waive the penalties at 42.709-1(a) when—

(a) The contractor withdraws the proposal before the Government formally initiates an audit of the proposal and the contractor submits a revised proposal (an audit will be deemed to be formally initiated when the Government provides the contractor with written notice, or holds an entrance conference, indicating that audit work on a specific final indirect cost proposal has begun);

(b) The amount of the unallowable costs under the proposal which are subject to the penalty is \$10,000 or less (*i.e.*, if the amount of expressly or previously determined unallowable costs which would be allocated to the contracts specified in 42.709(b) is \$10,000 or less); or

(c) The contractor demonstrates, to the cognizant contracting officer's satisfaction, that—

(1) It has established policies and personnel training and an internal control and review system that provide assurance that unallowable costs subject to penalties are precluded from being included in the contractor's final indirect cost rate proposals (*e.g.*, the types of controls required for satisfactory participation in the Department of Defense sponsored self-governance programs, specific accounting controls over indirect costs, compliance tests which demonstrate that the controls are effective, and Government audits which have not disclosed recurring instances of expressly unallowable costs); and

(2) The unallowable costs subject to the penalty were inadvertently incorporated into the proposal; *i.e.*, their inclusion resulted from an unintentional error, notwithstanding the exercise of due care.

#### 42.709-6 Contract clause.

Use the clause at 52.242-3, Penalties for Unallowable Costs, in all solicitations and contracts over \$500,000 except fixed-price contracts without cost incentives or any firm-fixed-price contract for the purchase of commercial items. Generally, covered contracts are those which contain one of the clauses at 52.216-7, 52.216-13, 52.216-16, or 52.216-17, or a similar clause from an executive agency's supplement to the FAR.

### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Section 52.242-3 is added to read as follows:

#### 52.242-3 Penalties for Unallowable Costs.

As prescribed in 42.709-6, use the following clause:

##### Penalties for Unallowable Costs (Oct 1995)

(a) *Definition. Proposal*, as used in this clause, means either—

(1) A final indirect cost rate proposal submitted by the Contractor after the expiration of its fiscal year which—

(i) Relates to any payment made on the basis of billing rates; or

(ii) Will be used in negotiating the final contract price; or

(2) The final statement of costs incurred and estimated to be incurred under the Incentive Price Revision clause (if applicable), which is used to establish the final contract price.

(b) Contractors which include unallowable indirect costs in a proposal may be subject to penalties. The penalties are prescribed in 10 U.S.C. 2324 or 41 U.S.C. 256, as applicable, which is implemented in Section 42.709 of the Federal Acquisition Regulation (FAR).

(c) The Contractor shall not include in any proposal any cost which is unallowable, as defined in Part 31 of the FAR, or an executive agency supplement to Part 31 of the FAR.

(d) If the Contracting Officer determines that a cost submitted by the Contractor in its proposal is expressly unallowable under a cost principle in the FAR, or an executive agency supplement to the FAR, that defines the allowability of specific selected costs, the Contractor shall be assessed a penalty equal to—

(1) The amount of the disallowed cost allocated to this contract; plus

(2) Simple interest, to be computed—

(i) On the amount the Contractor was paid (whether as a progress or billing payment) in excess of the amount to which the Contractor was entitled; and

(ii) Using the applicable rate effective for each six-month interval prescribed by the

Secretary of the Treasury pursuant to Pub. L. 92-41 (85 Stat. 97).

(e) If the Contracting Officer determines that a cost submitted by the Contractor in its proposal includes a cost previously determined to be unallowable for that Contractor, then the Contractor will be assessed a penalty in an amount equal to two times the amount of the disallowed cost allocated to this contract.

(f) Determinations under paragraphs (d) and (e) of this clause are final decisions within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601, *et seq.*).

(g) Pursuant to the criteria in FAR 42.709-5, the Contracting Officer may waive the penalties in paragraph (d) or (e) of this clause.

(h) Payment by the Contractor of any penalty assessed under this clause does not constitute repayment to the Government of any unallowable cost which has been paid by the Government to the Contractor.

(End of clause)

[FR Doc. 95-19860 Filed 8-15-95; 8:45 am]

BILLING CODE 6820-EP-M

#### 48 CFR Parts 31, 37, 42 and 52

[FAC 90-31; FAR Case 94-754; Item IV]

RIN 9000-AG21

#### Federal Acquisition Regulation; Implementation of Various Cost Principle Provisions

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** The Federal Acquisition Regulatory Council is amending the Federal Acquisition Regulation (FAR) to implement Section 2101 of the Federal Acquisition Streamlining Act of 1994. Section 2101 adds the costs of lobbying the legislative body of a political subdivision of a state to the list of unallowable costs; adds the cost of "conventions" to the list of costs to be clarified in the cost principles; and expands the coverage to the Coast Guard and NASA. The provisions are made generally applicable to all other executive agencies. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**EFFECTIVE DATE:** October 1, 1995.

**FOR FURTHER INFORMATION CONTACT:** Mr. Clarence Belton, Cost Principles Team Leader, at (703)602-2357, in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755.

Please cite FAC 90–31, FAR case 94–754.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

The Federal Acquisition Streamlining Act of 1994 (the Act), Pub. L. 103–355, provides the authority to streamline the acquisition process and minimize burdensome requirements unique to the Federal Government. Major changes that can be expected in the acquisition process as a result of the Act's implementation include changes in the areas of Commercial Item Acquisition, the Truth in Negotiations Act, and introduction of the Federal Acquisition Computer Network.

This notice announces revisions developed under FAR case 94–754, based on Section 2101 of the Act that adds the costs of lobbying the legislative body of a political subdivision of a state to the list of unallowable costs; adds the cost of "conventions" to the costs to be clarified in the cost principles; and expands the coverage to the Coast Guard and the National Aeronautics and Space Administration. Section 2151 amends 41 U.S.C. 256 to include all the provisions of 10 U.S.C. 2324, as amended by Section 2101. Therefore, the provisions are made generally applicable to all other executive agencies. The new FAR language, with only minor variations, was transferred from the current coverage in the Defense Federal Acquisition Regulation Supplement.

##### B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small businesses are awarded competitively on a firm-fixed-price basis and, therefore, are not subject to the FAR cost principles.

##### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

##### D. Public Comments

Eight public comments were received in response to the proposed rule

published in the **Federal Register** on December 13, 1994 (59 FR 64268). These comments were considered in the formulation of this final rule.

##### List of Subjects in 48 CFR Parts 31, 37, 42 and 52

Government procurement.

Dated: August 7, 1995.

**Edward C. Loeb,**

*Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.*

Therefore, 48 CFR Parts 31, 37, 42 and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 31, 37, 42 and 52 continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

##### PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

###### 31.205–1 [Amended]

2. Section 31.205–1(f)(3) is amended by adding "conventions," after "meetings,".

3. Section 31.205–6 is amended in paragraph (g)(2) by adding a sentence at the end of the introductory text and adding paragraph (g)(3) to read as follows:

###### 31.205–6 Compensation for personal services.

\* \* \* \* \*

(g) \* \* \*

(2) \* \* \* In addition, paragraph (g)(3) of this subsection applies if the severance cost is for foreign nationals employed outside the United States.

\* \* \* \* \*

(3) Notwithstanding the reference to geographical area in 31.205–6(b)(1), under 10 U.S.C. 2324(e)(1)(M) and 41 U.S.C. 256(e)(1)(M), the costs of severance payments to foreign nationals employed under a service contract performed outside the United States are unallowable to the extent that such payments exceed amounts typically paid to employees providing similar services in the same industry in the United States. Further, under 10 U.S.C. 2324(e)(1)(N) and 41 U.S.C. 256(e)(1)(N), all such costs of severance payments which are otherwise allowable are unallowable if the termination of employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States facility in that country at the request of the government of that country; this does not apply if the closing of a facility or curtailment of activities is made pursuant to a status-of-forces or other country-to-country

agreement entered into with the government of that country before November 29, 1989. 10 U.S.C. 2324(e)(3) and 41 U.S.C. 256(e)(2) permit the head of the agency, or designee, to waive these cost allowability limitations under certain circumstances (see 37.113 and the solicitation provision at 52.237–8).

\* \* \* \* \*

###### 31.205–22 [Amended]

4. Section 31.205–22 is amended in paragraphs (a) (3) and (4) by revising the phrase "Federal or state" to read "Federal, state, or local" each time it appears.

###### 31.205–43 [Amended]

5. Section 31.205–43 is amended in the introductory text of paragraph (c) and (c)(3)(ii) by inserting "convention," after "meeting," and in paragraph (c)(1) by inserting "conventions," after "meetings,".

6. Section 31.603(b) is revised to read as follows:

###### 31.603 Requirements.

\* \* \* \* \*

(b) Agencies are not expected to place additional restrictions on individual items of cost. However, under 10 U.S.C. 2324(e) and 41 U.S.C. 256(e), the following costs are unallowable:

(1) Costs of entertainment, including amusement, diversion, and social activities, and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities).

(2) Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State.

(3) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or has pleaded *nolo contendere* to a charge of fraud or similar proceeding (including filing of a false certification).

(4) Payments of fines and penalties resulting from violations of, or failure to comply with, Federal, state, local, or foreign laws and regulations, except when incurred as a result of compliance with specific terms and conditions of the contract or specific written instructions from the contracting officer authorizing in advance such payments in accordance with applicable regulations in the FAR or an executive agency supplement to the FAR.

(5) Costs of any membership in any social, dining, or country club or organization.

(6) Costs of alcoholic beverages.

(7) Contributions or donations, regardless of the recipient.

(8) Costs of advertising designed to promote the contractor or its products.

(9) Costs of promotional items and memorabilia, including models, gifts, and souvenirs.

(10) Costs for travel by commercial aircraft which exceed the amount of the standard commercial fare.

(11) Costs incurred in making any payment (commonly known as a "golden parachute payment") which is—

(i) In an amount in excess of the normal severance pay paid by the contractor to an employee upon termination of employment; and

(ii) Is paid to the employee contingent upon, and following, a change in management control over, or ownership of, the contractor or a substantial portion of the contractor's assets.

(12) Costs of commercial insurance that protects against the costs of the contractor for correction of the contractor's own defects in materials or workmanship.

(13) Costs of severance pay paid by the contractor to foreign nationals employed by the contractor under a service contract performed outside the United States, to the extent that the amount of the severance pay paid in any case exceeds the amount paid in the industry involved under the customary or prevailing practice for firms in that industry providing similar services in the United States, as determined by regulations in the FAR or in an executive agency supplement to the FAR.

(14) Costs of severance pay paid by the contractor to a foreign national employed by the contractor under a service contract performed in a foreign country if the termination of the employment of the foreign national is the result of the closing of, or curtailment of activities at, a United States facility in that country at the request of the government of that country.

(15) Costs incurred by a contractor in connection with any criminal, civil, or administrative proceedings commenced by the United States or a State, to the extent provided in 10 U.S.C. 2324(k) or 41 U.S.C. 256(k).

7. Section 31.703(b) is revised to read as follows:

#### 31.703 Requirements.

\* \* \* \* \*

(b) Agencies are not expected to place additional restrictions on individual

items of cost. However, under 10 U.S.C. 2324(e) and 41 U.S.C. 256(e), the costs cited in 31.603(b) are unallowable.

#### PART 37—SERVICE CONTRACTING

8. Sections 37.113, 37.113-1 and 37.113-2 are added to read as follows:

37.113 Severance payments to foreign nationals.

37.113-1 Waiver of cost allowability limitations.

37.113-2 Solicitation provision and contract clause.

#### 37.113 Severance payments to foreign nationals.

##### 37.113-1 Waiver of cost allowability limitations.

(a) The head of any agency, or designee, may waive the 31.205-6(g)(3) cost allowability limitations on severance payments to foreign nationals for contracts that—

(i) Provide significant support services for (i) members of the armed forces stationed or deployed outside the United States, or (ii) employees of an executive agency posted outside the United States; and

(2) Will be performed in whole or in part outside the United States.

(b) Waivers can be granted only before contract award.

(c) Waivers cannot be granted for—

(1) Military banking contracts, which are covered by 10 U.S.C. 2324(e)(2); or

(2) Severance payments made by a contractor to a foreign national employed by the contractor under a DOD service contract in the Republic of the Philippines, if the discontinuation of the foreign national is the result of the termination of basing rights of the United States military in the Republic of the Philippines (section 1351(b) of Public Law 102-484, 10 U.S.C. 1592, note).

##### 37.113-2 Solicitation provision and contract clause.

(a) Use the provision at 52.237-8, Restriction on Severance Payments to Foreign Nationals, in all solicitations that meet the criteria in 37.113-1(a), except for those excluded by 37.113-1(c).

(b) When the head of an agency, or designee, has granted a waiver pursuant to 37.113-1, use the clause at 52.237-9, Waiver of Limitation on Severance Payments to Foreign Nationals.

#### PART 42—CONTRACT ADMINISTRATION

9. Section 42.703(c)(2) is revised to read as follows:

#### 42.703 Policy

\* \* \* \* \*

(c) \* \* \*

(2) To ensure compliance with 10 U.S.C. 2324(a) and 41 U.S.C. 256(a), use established final indirect cost rates in negotiating the final price of fixed-price incentive and fixed-price redeterminable contracts and in other situations requiring that indirect costs be settled before contract prices are established.

10. Section 42.705-1 is amended by revising paragraph (b)(4) and adding (b)(5)(v) to read as follows:

#### 42.705-1 Contracting officer determination procedure.

\* \* \* \* \*

(b) \* \* \*

(4) The Government negotiating team shall develop a negotiation position. Pursuant to 10 U.S.C. 2324(f) and 41 U.S.C. 256(f), the contracting, officer shall—

(i) Not resolve any questioned costs until obtaining—

(A) Adequate documentation on the costs; and

(B) The contract auditor's opinion on the allowability of the costs.

(ii) Whenever possible, invite the contract auditor to serve as an advisor at any negotiation or meeting with the contractor on the determination of the contractor's final indirect cost rates.

(5) \* \* \*

(v) Notify the contractor of the individual costs which were considered unallowable and the respective amounts of the disallowance.

#### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

11. Sections 52.237-8 and 52.237-9 are added to read as follows:

##### 52.237-8 Restriction on Severance Payments to Foreign Nationals.

As prescribed in 37.113-2(a), use the following provision:

##### Restriction on Severance Payments to Foreign Nationals (Oct 1995)

(a) The Federal Acquisition Regulation (FAR), at 31.205-6(g)(3), limits the cost allowability of severance payments to foreign nationals employed under a service contract performed outside the United States unless the head of the agency, or designee, grants a waiver pursuant to FAR 37.113-1 before contract award.

(b) In making the determination concerning the granting of a waiver, the head of the agency, or designee, will determine that—

(1) The application of the severance pay limitations to the contract would adversely affect the continuation of a program, project, or activity that provides significant support services for (i) members of the armed forces stationed or deployed outside the United

States, or (ii) employees of an executive agency posted outside the United States;

(2) The Contractor has taken (or has established plans to take) appropriate actions within its control to minimize the amount and number of incidents of the payment of severance pay to employees under the contract who are foreign nationals; and

(3) The payment of severance pay is necessary in order to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services under the contract, or is necessary to comply with a collective bargaining agreement.

(End of provision)

#### **52.237-9 Waiver of Limitation on Severance Payments to Foreign Nationals.**

As prescribed in 37.113-2(b), use the following clause:

##### **Waiver of Limitation on Severance Payments to Foreign Nationals (Oct 1995)**

(a) Pursuant to 10 U.S.C. 2324(e)(3)(A) or 41 U.S.C. 256(e)(2)(A), as applicable, the cost allowability limitations in FAR 31.205-6(g)(3) are waived.

(b) This clause may be incorporated into subcontracts issued under this contract, if approved by the Contracting Officer.

(End of clause)

[FR Doc. 95-19861 Filed 8-15-95; 8:45 am]

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#### **48 CFR Part 31**

[FAC 90-31, FAR Case 94-750; Item V]

RIN 9000-AG33

#### **Federal Acquisition Regulation; Entertainment, Gift, and Recreation Costs for Contractor Employees**

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the Federal Acquisition Regulation to revise the cost principles governing entertainment, gift and recreation costs for contractor employees. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**EFFECTIVE DATE:** October 1, 1995.

**FOR FURTHER INFORMATION CONTACT:** Mr. Clarence M. Belton, Team Leader, Cost Principles Team, at (703) 602-2357, in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-31, FAR case 94-750.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

The Federal Acquisition Streamlining Act of 1994, Public Law 103-355 (the Act), provides authorities that streamline the acquisition process and minimize burdensome government-unique requirements. Major changes that can be expected in the acquisition process as a result of the Act's implementation include changes in the areas of Commercial Item Acquisition, the Truth in Negotiations Act, and introduction of the Federal Acquisition Computer Network. This notice announces Federal Acquisition Regulation (FAR) revisions developed under FAR case 94-750 to implement Section 2192 of the Act.

The final rule revisions to the cost principles at FAR 31.205-13 and 31.205-14 are made as a result of Section 2192 of the Federal Acquisition Streamlining Act of 1994. An interim rule was promulgated to meet the 120-day and 90-day deadlines in Section 2192 for changes to FAR 31.205-13 and 31.205-14, respectively. The interim rule was published in the **Federal Register** on January 13, 1995, 60 FR 3314. This final rule replaces the interim rule in its entirety for any contracts containing the interim rule. Thus, the provisions of the interim rule will not apply to costs incurred under any contract under any circumstances.

To comply with the requirements of paragraph (a)(1) of Section 2192, the final rule provides that the costs of gifts are expressly unallowable (31.205-13(b)). To clarify that the rule does not disallow costs which meet the definition of and are properly accounted for as compensation or recognition awards, the final rule provides a reference to 31.205-6, which allows compensation awards recognizing performance but also allows for recognition awards pursuant to an established contractor plan or policy. Additionally, it makes the costs of recreation expressly unallowable with the exception of costs of company sponsored employee sports teams and employee organizations designed to improve company loyalty, team work, or physical fitness. The final rule retains the allowability of "wellness/fitness centers" found in the interim rule. The final rule eliminates the requirement that costs are only allowable to the extent that the net amount per employee must be reasonable for all categories of costs under this cost principle.

To comply with the requirements of paragraph (a)(2) of Section 2192, the final rule revises the cost principle at 31.205-14 to incorporate the statutory

wording relating to the unallowability of entertainment costs and to delete the "but see" provision.

##### **B. Regulatory Flexibility Act**

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small businesses are awarded competitively on a firm-fixed-price basis and, therefore, are not subject to the FAR cost principles.

##### **C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, *et seq.*

##### **D. Public Comments**

Twenty-three public comments were received in response to the interim rule published in the **Federal Register** on January 13, 1995 (60 FR 3314). These comments were considered in the formulation of this final rule.

##### **List of Subjects in 48 CFR Part 31**

Government procurement.

Dated: August 7, 1995

**Edward C. Loeb,**

*Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.*

Therefore, 48 CFR Part 31 is amended as set forth below:

#### **PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES**

1. The authority citation for 48 CFR Part 31 continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Section 31.205-13 is revised to read as follows:

##### **31.205-13 Employee morale, health, welfare, food service, and dormitory costs and credits.**

(a) Aggregate costs incurred on activities designed to improve working conditions, employer-employee relations, employee morale, and employee performance (less income generated by these activities) are allowable, except as limited by paragraphs (b), (c), and (d) of this subsection. Some examples of allowable